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No. 92-6033

In The

Supreme Court of the United States

October Term, 1992

WILLIAM MCNEIL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether an incomplete filing of a Federal Tort Claims Act suit may be perfected by filing a notice of final agency denial of the claim prior to substantial progress on the merits?

II. May the United States government bar a Federal Tort Claims Act suit when a *pro se* prisoner files a premature suit, but satisfies the Congressional requirement – that the claim be presented to and denied by the agency before it is heard by the court – by filing a final agency denial of the claim prior to any substantial progress on the merits of the case, and, in so doing, requests the court to "commence his legal action?"

PARTIES

The caption contains the names of all the parties below although the United States was referred to as United States Public Health Service in the District Court.

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OPINIONS BELOW

The unreported opinion and judgment of the United States District Court of the Northern District of Illinois, *William McNeil v. United States Public Health Service*, No. 89 C 1822 dismissing the case on January 24, 1991 is reproduced in the Joint Appendix at 18 and 25.

The opinion of the United States Court of Appeals for the Seventh Circuit in *William McNeil v. United States* (Judge Ripple dissenting) is reported at 964 F.2d 647 (7th Cir. 1992) and along with the Judgment is reproduced in the Joint Appendix at 26 and 32 along with the decision of the United States Court of Appeals for the Seventh Circuit of June 26, 1992 denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc.

The order of the Supreme Court granting certiorari and leave to proceed in forma pauperis is reprinted in the Joint Appendix at 33.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of the case was filed on May 20, 1992, and amended May 26, 1992. (with Judge Ripple dissenting) and appears at Joint Appendix 26.

Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing en Banc was denied by the United States Court of Appeals for the Seventh Circuit on June 26, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

A petition for certiorari was duly filed in this court on September 21, 1992, and granted on January 15, 1993, which order is contained in the Joint Appendix at 33.

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. section 2675(a) now reads in pertinent part:

"An action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency. . . . The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant at any time thereafter, be deemed a final denial of the claim for purposes of this section."

The Appendix to this brief includes the following Statutes at Large, Public Laws and U.S.C.A. sections:

60 Stat. 843 (August 2, 1946) (79th Cong. 2nd Sess.)
Section 410(b), 60 Stat. 844 (Aug 2, 1946) (79th Cong. 2nd Sess.)
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28 U.S.C. Section 2675 (1992 pocket part, U.S.C.A.)
28 U.S.C. Section 2675 (U.S.C.A. 1965)
42 U.S.C. Section 6972(b)

STATEMENT OF THE CASE

Prior to filing suit Mr. McNeil demanded damages by a letter dated January 17, 1989 he mailed to the Department of Health and Human Services, Public Health Service. On January 24, 1989 the Chief Counsel for the

Department informed Mr. McNeil that his letter would be forwarded to a Public Health Services claims officer. Jt.App.17. By letter dated February 9, 1989, Mr. McNeil was informed that no records could be located of the alleged experiments. Jt.App.8.

On March 6, 1989 Mr. McNeil filed suit pro se in the United States District Court for the Northern District of Illinois. Jt.App.1. In that suit Mr. McNeil alleged that agents of the federal government conducted AIDS and Hepatitis B experiments upon Mr. McNeil without his consent while he was a prisoner in Stateville Correctional Center, Jt.App.3-7, and that he contracted hepatitis as a result of these experiments. Jt.App.7, 10. The experiments alleged also included being forced to "except (sic) cell-mate with A.I.D.S." Jt.App.7, which "clearly impared (sic) Plaintiff life" Jt.App.7.[1]

Mr. McNeil's March 6, 1989 filing was lost by the court at some point in the "crush of prisoner litigation." Jt.App.20. Mr. McNeil's initial request for permission for leave to proceed in forma pauperis was stayed by an order of the court on June 12, 1989 pending further order of court. Jt.App.1.

On July 7, 1989 Mr. McNeil filed another claim in the Department of Health and Human Services. Health and Human Services denied this claim (for $500,000) on July 21, 1989. Jt.App.11-13.

On August 7, 1989 Mr.McNeil sent a letter to the district court Jt.App.10, and an affidavit in support of his

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[1] The three page complaint alleged three interrelated counts. These experiments were alleged to be on the spread of infectious diseases, and included forcing AIDS carriers to cell with other inmates. The experiments were allegedly in violation of HEW and FDA regulations. The allegations included negligent failure to warn, "adequate to warn the Plaintiff concerning the long term effects of exposure to the infectious diseases," as well as fraud and deceit. The complaint requested "the sum of 20,000,000,000 twenty million dollars" [sic] Jt.App.7.

earlier motion for appointment of counsel. Record, Item 5 Mr. McNeil attached a copy of the Sum Certain Denial of July 21, 1989 with that filing. Jt.App.12-13. At the time this letter was filed the government had neither answered nor moved to dismiss. The August 7, 1989 letter included the statement:

"However, under the circumstances that exist here at Stateville Correctional Center, it's clearly impossible to file proper motions; therefore, plaintiff prays this Honorable Court accepts this letter as a proper request, whereas plaintiff can properly *commence* his legal action accordingly." (emphasis added)

The letter also contained a statement that the copy of the Sum Certain attached was the "second permission from P.H.S. which allows plaintiff Willaim (sic) McNeil to file a tort claims against the defendant Public Health Services." Jt.App.10.[2]

On April 20, 1990 the district court found that Mr. McNeil had paid the filing fee, and that therefore the motion for leave to proceed in forma pauperis was moot. Jt.App.1. On April 20, 1990 the district court ordered service by the United States Marshall's office because Mr. McNeil was incarcerated. Jt.App.1.

A docket entry indicates that Mr. McNeil's [original] complaint was filed on May 15, 1990. Jt.App.2.[3]

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[2] The record is not clear what Mr. McNeil considered the first permission, although the February 9, 1989 letter indicating that no records could be located of the alleged experiments is one possibility. On August 19, 1989, an affidavit in support of a motion for appointment of counsel with attachments including the August 7, 1989 letter was received by the clerk and docketed on August 25, 1989. Jt.App.1.

[3] A photocopy of a check dated May 9, 1989, made out to Clerk H. Stuart Cunningham [who is clerk of the United States District Court for the Northern District of Illinois] for $120, drawn on the Stateville Correctional Center, Inmates' Trust Fund, and stamped paid May 18, 1989 with an entry on the face 89C1822 was attached to Mr. McNeil's April 9, 1991 brief in the Seventh Circuit. However, the first docket entry reflecting payment was on April 25, 1990 and reflected that the receipt was temporarily unavailable. Jt.App.1. The docket entry on April 25, 1990 indicated it was filed May 15, 1990. Jt.App.1. No subsequent docket entry reflects either the date the payment was received or that the receipt had been located [or whether the May 15, 1990 date should have been May 15, 1989 instead]. Service of process upon the U.S. Public Health Service was reflected by a docket entry of August 7, 1990. Jt.App.2.

On August 28, 1990, the United States Government answered Mr. McNeil's complaint alleging that Mr. McNeil had voluntarily agreed to the experiments; that the experiment had employed separate sterile needles to extract blood from each inmate; that the United States Public Health Service, Center for Disease Control admitted it had funded a study on the prevalence of HTLV-III LAV and HBV among male inmates; and that the government generally denied liability. Jt.App.14-16.

On September 19, 1990 the Government moved to dismiss alleging that the suit was barred under 28 U.S.C. Section 2401(b). Record, Item 19. On January 24, 1991, the District Court granted the government's motion to dismiss. The court held that the suit had been filed on March 6, 1989, and Mr. McNeil had not complied strictly with the Federal Tort Claims Act in that the sum certain denial had not been received prior to filing suit. Jt.App.18.

This finding was affirmed by a 2-1 decision of the United States Court of Appeals for the Seventh Circuit in its judgment and opinion of May 20, 1992 even though the opinion stated, "[i]it is too late" for Mr. McNeil "to file another [suit]." Jt.App.27. The opinion of the Seventh Circuit rested in part upon this court's holding about an analogous filing requirement for environmental laws in *Hallstrom v. Tillamook County*. 493 U.S. 20 (1989).

Jt.App.28. The dissent by Judge Ripple, found it unnecessary to reach the "difficult issue of whether a Federal Tort Claims Act suit must be refiled when the administrative claim is denied before any substantial progress has been made in the pending litigation. . . . [because] it is clear that the plaintiff, a prisoner proceeding pro se, attempted to refile the action after the denial of the administrative claim [by sending the August 7, letter]." Jt.App.30-31.

A Petition for Rehearing with Suggestion for Rehearing En Banc was filed on May 28, 1992. Jt.App.26. The Petition for Rehearing suggested inter alia that neither the government nor counsel for Petitioner were aware of *Hallstrom v. Tillamook County*, and thus that neither had given the Seventh Circuit the benefit of their analysis. Pet. for Rehearing, p.2. The Petition suggested that the legislative history of the Federal Tort Claims Act was considerably different from that of the environmental statutes involved in *Hallstrom v. Tillamook County* and that this court's decision in *Hallstrom v. Tillamook County* did not bar petitioners from any access to judicial relief. Pet. for Rehearing, p.3. The Petition for Rehearing was denied June 26, 1992. Jt.App.26.

A petition for writ of certiorari was filed in this court on September 21, 1992. Certiorari was granted on January 15, 1993 along with an order granting in forma pauperis status. Jt.App.33.

SUMMARY OF ARGUMENT

The question presented to the Court is whether the government may exalt form over substance by requiring prematurely filed Federal Tort Claims Act cases with procedural defects to be dismissed even when the defect is cured before the district court acts to assert jurisdiction over the substance of the claims. If the government's position is correct it will result in one of two unproductive outcomes: prematurely filed cases with cured defects will be dismissed and refiled, thus simply adding a level of paper shuffling to the case; or prematurely filed cases

with cured defects will be dismissed and time barred because the statute of limitations would have run, as it has in this case. Such plaintiffs will be denied their day in court, even though they have complied with the notice and exhaustion requirements of the Federal Tort Claims Act.

Mr. McNeil fully complied with the Congressional requirement that he make an administrative demand upon the relevant federal agency. Indeed, Mr. McNeil, a pro se plaintiff, complied with each and every expressed Congressional purpose by August of 1989 by presenting two Sum Certain Demands on the relevant administrative agency. Moreover, he twice fulfilled the exhaustion requirement, once through receiving a sum certain denial about which he informed the court, and the second time through passage of time. Even were his initial court filing ineffective, by the time of his August 1989 filings when Mr. McNeil specifically requested that he be permitted to "commence his legal action" his suit should proceed either because that filing constituted a new filing, or alternatively, a filing that perfected his original court filing. The loss of Mr. McNeil's court record should not be permitted to injure him.

The legislative history of the Federal Tort Claims Act establishes clear intent to waive sovereign immunity for certain torts including the one at issue in Mr. McNeil's case. In doing so, Congress intended that courtroom doors be opened, while the doors to Congress were simultaneously shut to private bills that clogged Congress and burdened the President. No claims were to be cut off; justice and fairness were the objectives of the new remedy system. Claimants against the government were to be treated the SAME as litigants suing private defendants. The Federal Tort Claims Act was to be a simple remedy. The only limitation on the timing of suit in the original passage of the Federal Tort Claims Act was that claims under $1,000 had to first be presented to an administrative agency, but the claimant was free to withdraw such claims upon 15 days notice in writing and file suit.

Subsequent legislative considerations of amendments to the Federal Tort Claims Act, including the 1966 amendments (which expanded the requirement of presentation of claims to administrative agencies regardless of the amounts at controversy) lack any expressed intention to condition the right to sue on strict technical compliance in presenting claims to an administrative agency. Moreover, no subsequent amendment incorporates any articulated "condition upon waiver of sovereign immunity" for the waiver of such immunity had already been given in 1946.

Exhaustion is quite a different matter. Petitioner McNeil does not dispute that the exhaustion requirement in the FTCA is a prerequisite to recovery under the Act. The question here, however, is how should the government treat claims by plaintiffs who file prematurely but cure any defect before the court moves to dismiss their case. If the district court had turned to Mr. McNeil's claim before he had exhausted as required by the FTCA, the government could have had a basis on which to object, and the court could have dismissed the claim. Mr. McNeil could then simply exhaust and refile. In fact, Mr. McNeil had exhausted nearly a year and a half *prior* to dismissal of his case.

The legislative history of the 1966 amendments indicates that Congress found guidance for the requirement that all claims be presented administratively in statutes relating to suits against municipalities. This court may similarly seek such guidance. The weight of judicial treatment of such municipal statutes suggest that substantial compliance with the presentation of such claims to the municipalities suffices. (Indeed, authority exists that filing suit during the time for giving such notice, constitutes adequate notice.) Moreover, there is ample authority that such statutory notice requirements are statutes in derogation of the common law which should be construed strictly against the municipality and in favor of the claimant's right to litigate.

Nowhere in the legislative history of the Federal Tort Claims Act or its amendments, including amendments during and subsequent to 1966, has a single member of Congress or a committee of Congress expressed any intention, or contemplation that the Federal Tort Claims Act should be strictly construed with respect to its notice provisions. Indeed, the pro se litigant, appears never to have been mentioned, although Congress did manifest its intention to encourage the presentation of FTCA claims.

A rule that claims filed prematurely may be perfected so long as no substantial progress has occurred is consistent with the intent of Congress to promote remedies under the Federal Tort Claims Act so that claimants receive their day in court. No reason in policy exists explaining why a remedy for a tort by a Governmental employee should be fundamentally different from that against a private tortfeasor, so long as all expressed purposes of Congress have been satisfied. It is the presentation and exhaustion of the administrative claim that fulfills those purposes. Mr. McNeil did both.

The government's position is particularly harsh in the case at bar when Mr. McNeil filed his sum certain denial along with an affidavit explaining his lack of books in jail and his desire that the court "commence" his claim. The dissent below found that this plea for the court to commence proceedings constituted a complaint, i.e., a supplemental pleading, which clearly cured the prior defect, if any. *See*, Federal Rules of Civil Procedure 15(d) (court may permit the party to serve a supplemental pleading setting forth new events which have happened since the date of pleading sought to be supplemented even though the original pleading is defective in its statement of a claim for relief.)

Mr. McNeil alleges that he contracted hepatitis as a result of government-conducted and sponsored experiments to which he was subjected without his consent. He did everything in his power to pursue his rights against the government under the Federal Tort Claims Act. He

should not be penalized by a cramped construction of a requirement ultimately met before the government's position on the merits was ever pleaded, much less prejudiced.

The statutes considered in *Hallstrom v. Tillamook County,* 493 U.S.20 (1989) are distinguishable, both because of the different legislative history, as well as because the explicit Congressional purpose of encouraging governmental entities to sue about "public environmental rights" cannot be satisfied by premature "private attorneys general" litigation. The Federal Tort Claims Act involves essentially private rights for which the provision of remedies was Congress's clear and primary aim.

In Mr. McNeil's case, since the administrative remedy has failed, Congress's intent that the judicial remedy be available, should be honored.

ARGUMENT

1. Federal Torts Claims Act Legislative History

OVERVIEW:

The Federal Tort Claims Act enactment in 1946 waived sovereign immunity for all torts covered. Subsequent statutory changes do not affect the essence of that waiver, for the waiver was unconditional. The 1966 amendments were not conditions on a waiver, for the waiver took place 20 years prior. The 1966 amendments were attempts to improve procedures with respect to claims against the Government. The objectives of fairness and equality of treatment between private claimants suing the government and such private claimants suing other private parties were fundamental objectives of Congress beginning with the 1946 enactment and remained so. Not once during consideration of the Federal Tort Claims Act or subsequent amendments in 1940, 1942, 1946, 1948, 1949, 1959, 1966 or thereafter, did a single Congressperson indicate a desire (or contemplation) that strict compliance with the procedural *notice* provisions

were jurisdictional prerequisites or conditions on the waiver of immunity itself. Nowhere did Congress endorse a cramped interpretation of the waiver of sovereign immunity, or express any explicit intent that the doctrine that the king could do no wrong survived in peculiar forms of ritual ceremonies. Not one Congressperson discussed a *pro se* claimant, and the few references to attorneys were primarily directed at ensuring that claimants had access to adequate, competent counsel to represent them.

The context of the passage of the Federal Torts Claims Act (App. 1) is important for the Act was only *part* of the Legislative Reorganization Act of 1946 although passage reflected years of legislative consideration of FTCA bills, including requests of waiver of governmental immunity from suit that go back at least to President Lincoln's First Annual Message to Congress, December 3, 1861.[4] The American Bar Association supported a 1940 FTCA draft, a draft described as treating rich and poor alike, which was virtually identical to the Federal Tort Claims Act eventually enacted in 1946.[5]

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[4] "It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the government, especially in view of their increased number by reason of the war. It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same justice between private individuals. The investigation and the adjudication of claims in their nature belong to the judicial department. Congressional Record, 76th Congress, Third Session, Vol. 86, June 22, 1940, at 4175.

[5] Testimony before the House Judiciary Committee, April 3, 1940, reprinted at Congressional Record, 76th Congress, Third Sess. Vol. 86, June 22, 1940, p. 4175 supporting a 1940 bill that would:

"[R]elieve Congress of the necessity of considering the many private bills . . . with the attendant waste of time and, . . . it will afford the private citizen easy and simple access to the courts of the United States. . . .

However, the Legislative Reorganization Act of 1946 went far beyond enactment of the Federal Torts Claims Act. The Act was a major attempt to reorganize Congress into a more efficient body. The FTCA portion of the Act involved a legislative trade off, a ban of private (tort) bills if Federal Torts Claims Act procedures were applicable.[6]

"The poor injured person should be given the same right to have his day in the United States courts as has been given by Congress to big shipowners to sue in tort, contractors, patentees, and taxpayers. There should be no discrimination in Congress between citizens of this country. The poor and the rich should be treated alike. Members of Congress should not be obliged to spend a great deal of their time in pressing private claims, but in these critical days should be able to give their time to matters of high importance to our great country and the people. It is an imposition to call upon members of Congress to handle private claims.

It is submitted that the ability to proceed against the Government for torts committed by its agents should be a right. In effect, the United States is a corporation, exercising all the privileges and functions of a corporation, and should be answerable to its citizens for its wrongs in no less a degree than a private person or a body corporate.

We believe that the proper forum for relief for personal injuries or injury to property, occasioned by acts of government agents, is in the United States courts where the judge would have the opportunity of seeing and examining all witnesses and weighing the matter of liability, rather than having the relief in any manner dependent upon representation before committees by congressional representatives through friendship or because of political affiliation."]

[6] Part 3 – Section 121, Ch. 773 – Public Law 601, reprinted at U.S. Congressional Service, 79th Congress, Second Session, 1946 at 796. Other major items included in the Legislative Reorganization Act of 1946 were the reorganization of the committee structure of Congress (and associated rule changes) which inter alia drastically reduced the number of committees (from 48 to 19 in the House) (Title I, sec. 121); various provisions regarding congressional personnel (Title II, Part 1); regulation of lobbying

A. The Hydraulic Pressure of Private Torts Claims Bills on Congress and the President Was Perceived as Enormous as Was the Demand for the Same Right to a Day in Court for Claimants against the Government as Claimants had against Private Defendants; Sovereign Immunity was seen as an Incongruous Entity with only Historical Justification

The simple volume of private claims bills representing tort claims for property and personal injury claims had long been perceived as an excessive burden on both Congress and the President.[7]

(Title III); increases in compensation and retirement pay for Congressmen (Title VI); and a general bridge act (Title V), which removed most bridge approvals from Congress. It appears Congress deliberately sought to eliminate less important functions from its responsibility. This was not a random conglomeration of unrelated bills. See, Congressional Record – Senate, 79th Congress, Second Sess. Vol. 92, July 26, 1946, 10140. An earlier version of the act had included provisions providing for a degree of self rule for the District of Columbia, but those provisions were severed in deference to a similar bill from another committee. Congressional Record – Senate, 79th Congress, Second Sess. Vol. 92, June 6, 1946, 6397.

[7] On June 16, 1942 House Report No. 2245, 77th Congress, Second Sess. from the Committee on the Judiciary (to accompany S. 2221) indicated that more than 2,000 private claims bills were introduced in each Congress, with a substantial percentage of these representing claims for property damage or personal injury. (p. 6)

Almost 6,300 private claims bills had been submitted during the three congresses prior to the 77th Congress. President Roosevelt stated in his message of January 14, 1942, reprinted in part at p. 6 of the House Report No. 2245: "And of all the bills which I vetoed during these Congresses, fully one-third was made up of private claim bills."

The costs of such bills (excluding Congressional salaries) was estimated at $125,000, the printing cost alone for bills that

The torts provisions of the bill considered by Congress in 1942 (virtually identical to the Federal Torts Claims Act provisions passed in 1946) were:

> "an effort to achieve the objectives expressed in the President's message of January 14, 1942 (a) to set up a satisfactory procedure for the administrative and judicial determination of negligence claims in order that the Congress and the President should be relieved of the burden and expense of disposing of such matters by private claim bills and (b) to extend to claimants against the Government the *same right to a day in court* which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims. By thus removing a considerable burden from the shoulders of the Claims committees of both Houses, as well as from the members of Congress as a whole, added time will be made available for the consideration of matters of grave national importance." Senate Report No. 1196, (to accompany S. 2221) 77th Congress, 2nd Sess. March 25, 1942, p. 5. (emphasis added)[8]

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fail to pass was almost $19,000 per Congress, and that it costs $200 to pass a single bill, although in some cases the claims bills are enacted in amounts less than $200. (p.6) The President supported the Federal Tort Claims Act as a "means of dispensing justice *simply* and effectively to tort claimants against the Government and give them the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims." p.6. (emphasis added).

[8] The report went on to state: "As a result of the statutes briefly summarized above, the Government is subject to suit in contract, on admiralty and maritime torts, and for patent infringement. On the other hand, no action may be maintained against the Government in respect to any common law tort. *The existing exemption in respect to common law torts appears incongruous. Its only justification seems to be historical.* With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles." House Report No. 2245, 77th Congress, Second Sess. June 16, 1942 p. 7 (emphasis added)

Former Attorney General Robert H. Jackson had supported a similar bill by a letter of Feb. 14, 1940 which stated: "The present law under which the Government may not be sued in tort, and such claims can receive recognition only as a matter of grace by private acts of Congress, appears to be not only cumbersome but unfair to those persons who have meritorious claims. . . . The continued immunity of the Government to suit on common law torts does not seem to be warranted either as a matter of principle or as a matter of justice." H.R. Report. No. 2245, p. 12.

[9] Rep. Monroney went on to state that 435 saints could not possibly do with Congress's present equipment and organization it was so obsolete and antiquated. (Id. at 10041)

B. Legislative History of the 1946 Enactment confirms the Purposes of the Federal Tort Claims Act Include Saving Congressional Time While According Claimants the SAME RIGHT TO A DAY IN COURT as if Private Defendants Were Being Sued

Rep. Monroney who shared floor responsibility for the Legislative Reorganization Act of 1946 described the bill as a whole by reference to a single overarching test:

> "One test and one test alone has been applied to every suggestion that has been incorporated in the bill in the committee's recommendation and that is simply the question 'Will it help the Congress to do a better job?' " Congressional Record – House, Congress, Second Sess. Vol. 92, June 25, 1946. 10039.[9]

Rep. Monroney emphasized that no claim would be blocked by the legislation, there would be a place to go to seek a remedy:

> "[I]n this claims section every time we have closed the door of admittance of a claim on the floor of Congress we have opened up another door in the administrative departments or in the courts of the land so that those claims can be adequately adjudicated. Therefore, there will be no claims blocked. . . . Either they have a right to come up on the floor of the House or to come before the Congress or they can go into the courts." Congressional Record – House, 79th Congress, Vol. 92, July 25, 1946, 10039.

Rep. Dirksen (who shared floor responsibility) stated, "[W]hat better than to endow upon the citizen of the country the right and the authority, notwithstanding the old doctrine under which the king could not be sued by a

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Rep. Monroney pointed to the hands on the clock in the chamber: "[T]he demands on his [a Congressperson's] time are incessant and even oppressive. . . . So comprehensive are the many changes proposed, so significant is each to our policy and procedure, and so worthy is each of special note that it is impossible here to attend to all. A quick review will, however, show us an impressive array, revolutionary yet fitting. Witness. Improved fiscal procedure. Private bill banned; the claims deferred to the courts. . . . " (Id. at 10054) The theme of Saving Congressional Time was much reiterated. See Remarks of Rep. August H. Andresen which included part of committee report 10046-48 "Saving Congressional Time. . . . Congress is overburdened by many local and private matters which divert its attention from national policy making and which it ought not to have to consider. It functions as a common council for the District of Columbia. It serves as a tribunal for the settlement of private claims. . . . " Id. at 10048

The legislation enacted in 1946 was substantially identical to the drafts of the Federal Tort Claims Act considered in 1940 and 1942.

subject, to go into the district courts? We confer upon the district courts of the country the right to hear these suits, and that immunity is waived. *Let the district judge do it. . . . it is his responsibility.*" (Id. at 10049) (emphasis added)

Few representatives opposed the Federal Tort Claims Act provisions of the Legislative Reorganization Act of 1946. Those few included Rep. Scrivner who agreed with its proponents by describing the bill as providing for the right to sue the Government *"just exactly as against the private individual."* Congressional Record – House, 79th Congress, Vol. 92, July 25, 1946, 10092.

The same themes of saving time for Congress, of access either to the administrative agency or the courts were sounded in the Senate. According to Senator LaFollette, the Senate floor leader, the bill's purpose was, "[N]ot to cut off claimants who might have proper claims to present to the Government. It will permit them to press their claims. . . ."[10]

The citizen was entitled to either a judicial, administrative, or Congressional remedy. To deny Mr. McNeil a remedy, leaves him and similarly situated citizens no option but to seek relief through a private bill in Congress, exactly the remedy and *burden* on Congress[11]

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[10] Congressional Record – Senate, 79th Congress, Second Sess., June 5, 1946, 6344. The Act was seen as very important legislation. Sen. LaFollette went on: "So I weigh my words when I say that I think the ultimate fate of democracy is bound up in this first step forward in the reorganization and modernization of our National Legislature." (Id. at 6370-71)

[11] Senator Bridges even suggested various Congressmen died from overwork, partly from the fact that 9000 bills were pending in Congress. Congressional Record – Senate, Congress, First Sess. June 10, 1946, 6559.

Senator Barkley lamented the lack of time during recesses of Congress such as Henry Clay had once enjoyed and spent wearing out a depression in a path while contemplating next

which Congress had sought to eliminate by passage of the Legislative Reorganization Act of 1946.[12] This court

January's speeches he intended to make. Congressional Record – Senate Congress, Second Sess. Vol. 92 June 8, 1946. 6537.

Senator White, who had been a clerk in the Senate 45 years prior noted that, "In those days a great senator, such as Senator Lodge, with influence throughout the world, had time and took time to rewrite a speech eight times before delivering it on the floor of the Senate. We frequently stand here on the floor of the Senate and talk without having had a moment's preparation. . . . The congress of today is performing a volume of work which it was never designed to perform but which it cannot avoid." 6531-32

An example was cited of a claim for $163.20 that took 16 years to pay through a private bill. Congressional Record – Senate, 79th Congress, Second Sess. Vol. 92, June 19, 1946 (legislative day of March 5, 1946) A3604.

[12] Strong support existed across the nation for the Legislative Reorganization Act of 1946. Numerous newspaper editorials supported the bill. See Extensions of Remarks of Sen. Robert Taft, Congressional Record – Senate, Congress, Second Sess. Vol. 92, June 25, 1946, A 3732-33, and Rep. Estes Kefauver (Tenn.) A3733-34, including an editorial from the World Herald of Omaha, Nebraska. "There would be new machinery for handling property-damage and personal-injury claims against the United States and the flood of petty claims bills would be stemmed. . . . It is 'must' legislation if the Congress of the United States is to continue its legislative functions." A3734, A 3723-24, and Rep. Charles A. Plumley (Vt.), Editorial of the New Bedford (Mass) Standard-Times, of June 12, 1946, "Further to promote the aim of giving Members of Congress more time to devote to the major business of law-making is a prohibition of what are called private bills. These usually are concerned with small claims for damages." Congressional Record – Senate, 79th Congress, Second Sess. Vol. 92, June 26, 1946, A3748, and Rep. A.S. Mike Monroney (Cal.) "Three Hundred and Eighty Newspapers Support Reorganization of the Congress." Congressional Record, 79th Congress, Second Sess. Vol. 92, July 12, 1946 A 4247-48, and Sen. Robert A. Taft (Ohio) "Our Horse-

should not reimpose that burden without clear Congressional indication it should be reimposed, or alternatively, some clear policy purpose of Congress that would be served, rather than disserved, by such reimposition.

C. The 1966 Amendments Continue the Same Themes: Justice and Equality of the Private Claimant in Actions Against the Government as in Private Actions.

The requirement that all federal tort claims be submitted for administrative determination was aimed at saving time, money, and providing effective justice for both the private claimant and the government. No indication exists in the legislative history of any intent to create a trap for the unwary *pro se* claimant. Instead Congress sought a new balance, preserving the right to sue while encouraging a limited form of administrative exhaustion, a six months *grace* period for negotiation.

The 1966 amendments to the Federal Torts Claims Act required for the first time that all claimants present a claim to the appropriate administrative agency prior to filing suit.[13] Since 1966 the Federal Torts Claims Act has

and-Buggy Congress" Congressional Record, 79th Congress, Vol. 92, A3732-33.

[13] In 1959 the amount for which administrative submission was required was raised from $1,000 to $2,500. (73 Stat. 472, App. 14) The agency was given 6 months to consider the claim. Final denial in this connection, included instances where partial approval of a claim resulted in an offer unacceptable to the claimant and are rejected by him. Thus the end result would be a denial of the claim. However, if the agency failed to act in 6 months, the claimant may elect to regard this inaction as a final denial and proceed to file suit. The claimant has six months from the date of mailing of a denial to file suit. The 1966 requirement of presentation of all claims to the appropriate administrative agency was accompanied by elimination of the 15 day right to withdraw a claim by notice in writing.

remained for purposes of the instant litigation in substantially the same form that it has today.[14]. During legislative consideration in 1966 of a package of amendments to the Federal Tort Claims Act and related statutes, concepts of *fairness* and *equality* between the Government and private litigants were often mentioned.[15] One of the 1966 bills

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[14] In 1974 certain intentional torts were covered by the Federal Tort Claims Act, see Congressional Record – Senate, 93d Cong., First Sess., Vol. 119, October 10, 1973, 33495, remarks of Sen. Hruska ("primary purpose was to put the Federal Government on a par with private employers in situations where employees committed torts within the scope of their employment," and related remarks of Sen. Percy, Congressional Record – Senate, 95th Cong., Second Sess., Vol. 124, April 10, 1978, 9467. Also see a proposal by Sen. Stevenson to extend FTCA coverage to include ultrahazardous activity, Congressional Record – Senate, 93rd Cong., First Sess., Vol. 119, October 26, 1973, 35085. In each instance the proposal or enactment was aimed at making the same remedies available for intentional torts or ultrahazardous activity against the federal government as would be available against private defendants. As Sen. Stevenson stated: "I see no reason why the Federal Government should remain immune while private persons can be sued for the identical dangerous conduct." Equality continued as a dominant theme, with no hint of special exceptions.

[15] A package of four interrelated bills (S. 3142, S. 3143, S. 3161 & S. 3162) on recommendations from the Department of Justice were introduced. Congressional Record, House, 89th Cong. Second Sess. Vol. 112, June 6, 1966. H.R. 12259. Other objectives were also mentioned, including reduction of the volume of private relief bills, encouraging early trials while memories were still fresh and necessary witnesses and documents available. See, Senator Ervin at Congressional Record, Senate 89th Cong. Second Sess., Vol. 112, March 29, 1966, 6876, and June 27, 1966, 14378.

"These four bills have a common purpose, and that purpose is to provide a *more fair and equitable treatment for private individuals* and claimants when they deal with the Government or are involved in litigation with their Government." Rep. Ashmore,

dealt with equalizing the assessment of costs to the prevailing party. Congress sought to remove (and did remove) the existing disparity that: "When the United States is sued and wins, it may be awarded costs; [but] when the United States is sued and loses, costs may not be awarded against it."[16] Fairness and equality were mentioned again and again.

The new requirement that all claims, including those over $2,500 be submitted to the relevant administrative agency was not designed to foil litigants, but rather to save time and money and encourage the settlement of meritorious claims early.[17] Totally absent from the discussion in either the House or Senate was any suggestion that strict compliance with the formalities of the administrative submission was essential to the validity of a suit. Indeed, instead of a stick, Congress employed a carrot, by attempting to sweeten the attractiveness of the administrative remedy by increasing the fees recoverable by

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Congressional Record, House, 89th Cong. Second Sess. Vol. 112, June 6, 1966. H.R. 12259. (emphasis added)

[16] Sen. Ervin, Congressional Record, Senate, 89th Congress, Second Sess. Vol. 112, April 1, 1966, 7375. "The present law permits a disparity of treatment between private litigants and the United States concerning the allowance of court costs. . . . This bill will correct this disparity by putting the private litigant and the United States on the same footing as regards the award of court costs to the prevailing party in litigation involving the Government." Congressional Record, Senate, 89th Cong. Second Sess. Vol. 112, June 27, 1966, 14376.

[17] "This bill would institute a procedure under which all claims would be brought to the appropriate agency for consideration and possible settlement before court action is instituted. A claim would first be considered by the agency whose employee's activity allegedly caused the damage and which possesses the greatest information concerning that activity. As a result, meritorious claims would be settled more quickly, without the need for expensive and time-consuming litigation or even for filing suit." Sen. Ervin, Id. at 7375.

attorneys.[18] Congress thereby endeavored to facilitate remedies for meritorious claimants.

Efficiency and compassion,[19] not minefields for the unwary were the objectives.[20] While Congress hoped to minimize the necessity of court action, nowhere did it expressly state court actions could be barred by procedural defaults (other than substantive exhaustion of the administrative route, a route that contained but a 6 month built in delay, and a route Mr. McNeil fully traveled).

Senate Report No. 1327 summarized the purposes involved in the requirement of administrative presentation of a claim, suggesting that it was partially based on the precedents of municipal statutes which required notice prior to suit:

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[18] Senator Ervin stated: "Finally, in order to encourage claimants and their attorneys to make use of this new administrative procedure, the attorney's fees allowable under the act would be raised from the present 10 percent of the administrative award and 20 percent of the settlement of judgment after filing suit to 20 and 25 percent respectively." Id. at 7375.

[19] "After the litigation is started, that is, when a suit is filed, the expense of course, increases for all parties. The claimant might be seriously injured or suffering from a loss of his property and in need of money." Congressional Record, House, 89th Cong. Second Sess. Vol. 112, June 6, 1966, H.R. 12259.

[20] Rep. McClory stated: "This measure . . . will enable claimants who have meritorious claims against the Federal Government to have them disposed of more expeditiously and at the same time to have them reviewed just as thoroughly as they are at the present time. . . . This measure, while it, *of course, continues to give the right to a person to file suit against the Federal Government*, nevertheless provides for a better method of settlement without the necessity of court action. . . . There are a great many claims these days and the effect of this legislation would be to facilitate their settlement through the use of administrative law procedures." Congressional Record, House, 89th Cong. Second Sess. Vol. 112, June 6, 1966, H.R. 13650. (emphasis added)

> "The requirement of an administrative claim as a prerequisite to suit has numerous precedents in statutes governing tort claims against municipalities. These laws often provide that a municipality must be given notice of an accident within a fixed time. The purpose of this notice has been summarized as being–
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> " * * * to protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit. (McQuillin, Municipal Corporations (3rd Ed.), section 53.153)."[21]

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[21] Senate Report No. 1327, 89th Cong. Second Sess. (1966), reprinted in Cong. & Admin. News, 2515 (1966). Specific references were made to the District of Columbia Code section 1-923 which required notice in writing plus waiting 6 months, and State of Iowa legislation under which claims must be presented to a state appeal board and no suit permitted unless the appeal board has made final disposition. (The Iowa statute has since been amended to allow suit 6 months after notice.)

Part of the reason for the change was that it had been discovered that failure to grant authority to agencies to settle cases for amounts over $2,500 meant that suits were encouraged, often in situations in which a negotiated settlement was possible soon after the formal filing of suit. However, the agency previously had no authority to settle prior to such a filing.

The committee report stated: "There is good reason to believe that even in many of these cases a claimant may decide to file suit because of the present limits upon administrative settlement. This is because as soon as the case is filed, the government can negotiate a settlement without regard to that limitation [$2,500]. It does not appear that this procedure is conducive to efficient claims administration. The filing of the suit and the consequent expense to the Government in preparing the case would appear to be unnecessarily involved when the case is a proper one for early settlement."

While reduction in court case load was one objective, neither the legislative report nor Congressional discussion indicate that a single Congressperson contemplated or intended that an incorrect early filing of a suit would prejudice the private claimant. Indeed, one explicit purpose was to give the Civil Division of the Justice Department more time to devote to more serious and complex cases such as Mr. McNeil's.[22] Mr. McNeil's allegations involving medical experimentation, with overtones of the infamous Tuskegee syphilis experiments,[23] fall squarely into the category of cases for which Congress intended such additional attention by encouraging many simple cases to be settled prior to suit. Congress clearly sought to strike a better balance between settlement in the administrative agency and litigation in court. Nowhere did Congress express an intent to bar the courtroom door for cases which could not be settled administratively.

Moreover, Mr. McNeil gave the agency two notices of his claim and received one explicit sum certain denial [indeed, it is unclear in the record that the agency ever responded to the first claim] and also more than 6 months after the first notice of claim, requested of the district

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[22] "Agency settlement of a substantial numbers of tort claims [which] would enable the Civil Division to give greater attention to those cases which involve difficult legal and damage questions in such areas a [sic] medical malpractice, drug and other products liability, and aviation accidents. These areas of litigation are expanding at a steady pace. . . .

It is obvious that there will be some difficult tort claims that cannot be processed and evaluated in this 6 months period. The great bulk of them, however, should be ready for decision within this period. . . . Some [claimants] may keep on negotiating, even then, but the idea of extending the limitations period was rejected." Congressional Record, Senate, 89th Cong. Second Sess. Vol. 112, June 27, 1966. 14377-78

[23] Jones, Bad Blood: The Tuskegee Syphilis Experiment, Free Press, & Collier Macmillan 1981.

court that he "can properly commence his suit." Jt.App.10. For unexplained reasons, the court did nothing for 8 months. Final dismissal of the suit took another 9 months. By any reasonable measure, the agency has had adequate notice, adequate opportunity to investigate, adequate opportunity to settle if it wished, and did in fact explicitly deny one of Mr. McNeil's claims.

D. The Legislative History of the specific Federal Tort Claims Act Provisions Regarding Time for Instituting Suit Accord with the General Remedial Purposes of the Act

Congress specifically expressed its desire to expand FTCA litigation in 1949 by lengthening the time for bringing suit to two years. While doing so, Congress rejected agency pleas that special defenses be available to the government. Only defenses available to private defendants were supposed to be available to the government.

i) Congress expanded the time for suit to two years and in doing so it indicated a desire to make FTCA litigation more like ordinary civil litigation

Congress demonstrated a specific intention to expand litigation under the Federal Tort Claims Act by enlarging the time to institute suit, and indicated while doing so a conscious design to make F.T.C.A. litigation more like ordinary civil litigation. See, House of Representatives Report 81-276, P.L. 81-55, Federal Tort Claims Act – Time for Bringing Suit, 81st Congress, 1st Sess., 1949 WL 1677 (Legis. Hist.) (March 21, 1949) (Only Report on this legislation) The reported bill (inter alia) enlarged the time for filing suit from 1 year to 2 years from the date of accrual

of an action.[24] In response to various federal agencies that opposed the change on grounds that it would "jeopardize the defenses of the Government in tort suits" the committee report replied, *"No clear distinction can be seen between the accessibility of defenses to the Government than to ordinary law or private defendants."* (1949 WL 1677, p. 5)[25]

The clear import of the 1949 Congressional Committee Report is that F.T.C.A. suits against the federal government should be as similar as possible to suits against ordinary defendants. The federal government was not

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[24] In justification of the proposed changes (enacted in 1949), the report stated: "The committee feel that, in comparison to analogous State and Federal statutes of limitation, the existing 1-year period is too short and tends toward injustice in many instances. For example, an analysis of the statutes of limitation of the 48 States and the District of Columbia reveals that the average limitation period provide for personal injury cases is 2.96 years, for property damage claims it is 3.90 years, and for cases of death by wrongful act it is 1.90 years. The over-all combined average is, accordingly 2.92 years, and this over-all average is the one to which the Tort Claims Act limitation should be compared with since the Tort Claims Act covers all three types of torts under one inclusive period of limitation. . . . Federal statutes providing time limitations for the bringing of tort actions indicate an over-all average of 2.2 years. . . . It will be observed, then, from the foregoing statistics, that the existing 1 year limitation is manifestly unjust and not in consonance with the practice prevailing in analogous departments of the law." (1949 WL 1677, pp. 3-4)

[25] The report concluded with a paragraph as follows: "It is not the intention of the Federal Government to deprive tort claimants of their day in court or of their remedies. Nor, on the other hand, does it propose to encourage delay in the enforcement of a claimant's rights or to harass the Federal agencies in their defense against such suits by increasing the difficulty of their procurement of evidence. . . . The period of 2 years proposed in the bill represents a happy medium which has been tested and found satisfactory in the laboratory of legal experience." (1949 WL 1677, pp. 5-6.)

supposed to receive special defenses, procedural defenses in particular, that were not available to other defendants.

Denial of Mr. McNeil's right to sue would have just the effect that the Congressional Committee report abjured; Mr. McNeil would be denied his day in court and the federal government would have a "special defense." It would not be enough to "cut square corners" when dealing with the federal government, those corners would have to be cut in the precise order (clockwise – fine, the suit proceeds; counterclockwise – no! Go back and do it again!) There is simply no legislative history supporting conversion of F.T.C.A. litigation into grand games of "Mother May I."

ii. The interrelated development of Sections 28 U.S.C. sec. 2401b and 2675 supports a practical not a hypertechnical interpretation of section 2675.

Two statutory sections, current sections 28 U.S.C. sec. 2401(b) and 2675, are central to the issue in the case at bar. The textual development of neither section supports a "hypertechnical" reading. Indeed, a practical, common sense interpretation appears more appropriate, one which suggests Mr. McNeil has fully complied with all substantial and substantive requirements of the F.T.C.A. so as to permit his suit to proceed.

a) Section 2401 statutory development:

The origin of the current text of the Federal Tort Claims Act Section 2401(b) began with section 420, 60 Stat. 845 (79th Cong. 2nd sess) August 2, 1946 (App. 6) which read:

> "Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in

writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to *institute* a suit pursuant to part 3 of this title *shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal* of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period." (emphasis added)

Section 410 gave the claimants the right to withdraw a claim from a Federal agency by giving 15 days notice in writing.[26] In 1949 a revision of the first sentence of 2401 (b) extended the one year period for most suits to 2 years. 63 Stat. 62 (81st Cong. 1st sess.) (April 25, 1949) (App. 12). In 1959 all references to $1,000 were changed to $2,500. Pub.L. 86-238, 73 Stat. 472 (86th Cong. 1st sess.) (Sept 8, 1959) (App. 14). In 1966 the text of section 2401(b) took its

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[26] The 1946 language was codified in 1948 by 62 Stat. 971 (80th Cong. 2nd sess) (June 25, 1948) (App. 8) in subsection (b) in section 28 U.S.C. section 2401 to read as follows: "A tort claim against the United States shall be forever barred unless action is begun thereon within one year after such claim accrues, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within one year after such claim accrues. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until after the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

current form, by eliminating all distinctions to amounts below and above $2,500 and thus requiring submissions of all claims to the "appropriate Federal agency." Pub. L. 89-506, 80 Stat. 307, (89th Cong. 2nd sess.) (July 18, 1966) (App. 15).

b) Section 2675 statutory development

The statutory origin of the current text of 28 U.S.C. section 2675 began with section 420 quoted above and also with section 410(b) of 60 Stat. 844 (Aug. 2 1946) (79th Cong. 2nd sess) (App. 4) which read in part as follows:

> Sec. 410(b) No suit shall be *instituted* pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, that the claimant may, upon 15 days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section:. . . .[27] (emphasis added)

Stat. 843 (App. 4)

Sections 420 and 410b were codified by 62 Stat. 983, (80th Cong. 2nd sess) (June 25, 1948) (App. 11) into 28 U.S.C. section 2675. The section then read:

> *2675: Disposition by federal agency as prerequisite: evidence*
>
> a) An action shall not be *instituted* upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the

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[27] Part 2 of the title conferred the authority upon the head of a federal agency or his designee to consider, ascertain, adjust, determine and settle claims for money damages for under $1,000. 60 Stat. 843 (App. 2)

government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

b) The claimant, however, may upon 15 days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this subsection shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.[28] (emphasis added)

c) Section 2675 as an evidentiary statute

It is worth noting that section 2675 as codified in 1948, with its internal and caption reference to various matters of evidence (limiting suits to the amount of the original demand unless a limited category of newly discovered evidence justifies exceptions) generally expanded the scope of possible claims by an individual. No language explicitly precluded suit.

Moreover, the "evidence" caption unmistakably refers to subsections (b) and (c). If that caption is also read to refer to section (a), it would suggest that the proof

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[28] After a minor (and irrelevant) change in 1949 (63 Stat. 107, (May 24, 1949)), (App. 14) section 2675 took its current form in 1966 with the enactment of 80 Stat. 306, Pub. L. 89-506 (July 18, 1966) (App. 16).

of such agency notification was also an evidentiary matter, not a jurisdictional matter. (The maxim *noscitur a sociis* applies). As such, a technical failure to exhaust would not deprive the court of jurisdiction, but simply subject such suits to potential dismissal if the government makes a timely motion to that effect. However, premature filing could be cured by evidentiary demonstration that the exhaustion requirement had in fact been fulfilled.

The close interrelationship between subsections (a) and (b) is best illustrated by the preconditions for filing suit involving claims under $1,000. Before *instituting* claims for such money damages a claimant was required to either have received the required final agency action (2675 (a)), or alternatively submit a fifteen day written notice of withdrawal of the claim (2675 (b)). In either situation specific documentary evidence would be available to demonstrate statutory compliance – either a copy of the final agency denial or else the written withdrawal notice. It is reasonable that Congress did not intend any peculiar procedural trap for those unversed in the law by the language of section 2675 (a) but simply meant and intended what it said, that the fact of withdrawal from the agency and/or final agency action be able to be *evidenced* to the court. Either of these documents would demonstrate to the court that the opportunity for investigation and/or settlement negotiation had been accorded the Government.

In this connection, recall the statement by the Congressional Committee Report discussed above at note 25 and accompanying text, rejecting pleas by various federal agencies for retaining the shorter (one year F.T.C.A.) statute of limitations, *"No clear distinction can be seen between the accessibility of defenses to the Government than to ordinary law or private defendants."* (1949 WL 1677, p.5) That *explicit* rejection of the concept of "special" treatment for the federal governmental as defendant has never been specifically disaffirmed. (Recall also, President Roosevelt's 1942 message to Congress advocating the Federal

Tort Claims Act "as a means of dispensing justice simply and effectively to tort claimants against the Government." Supra n.7)

After the 1966 amendments (App. 16) (which retain both the words *evidence* and *instituted* from the 1948 codification), proof of compliance with the statutory requirements of notice are similarly available in simple evidentiary form. The claimant may be required to disclose his original sum certain demand letter (if suit is predicated upon the 6 month period of non-response) or else the sum certain denial. By August, 1989, Mr. McNeil had accomplished and evidenced both to the court.

II. Examination of Case Law Regarding Analogous Notice Provisions in Municipal Statutes Indicates that Many Courts have Construed such Notice Provisions Against the Municipality and Not Against the Claimant.

Ordinarily, of course, this court would not pay particular attention to state court decisions while it interprets a federal statute. However, the peculiar federal statutory provision at issue in the case at bar contains explicit statutory history (*See, supra*. note 21 and accompanying text) indicating that Congress itself legislated with direct attention to state statutes involving notice provisions and suits against municipalities. For that reason it appears appropriate to review such references, even though most of the caselaw has to do with the adequacy of notice to municipalities, rather than prematurely filed suits. The question is whether strict enforcement of such notice statutes is appropriate against claimants. There is a substantial body of case law standing for the opposite proposition, and in favor of strict construction against the municipalities so as to accord substantial justice to claimants.

McQuillin[29] indicates that while there is a split of authority on the matter, it is clear that many state courts construe similar "municipal" notice[30] requirements strictly against the Government and not against the Claimants. Antieau states: "Technical accuracy in filing claims is not necessary, and the older doctrine of strict and literal compliance, with its attendant harsh and unfair results, has virtually disappeared from the law."[31]

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[29] The Law of Municipal Corporations, McQuillin, 3rd Ed. (1984), section 53.152, at p. 730: "[T]he statements in the cases as to whether they should be construed strictly or liberally are not altogether harmonious. It has frequently been announced that such laws should be strictly construed, or construed strictly against the municipal corporation and liberally construed in favor of the individual required to give notice, or that they should be liberally construed." (footnotes omitted) *Meisenheimer v. Chester*, 15 Ill.App.3d 1088, 1090, 305 N.E.2d 322, 324 (Ill.App. 5th Dist. 1973) ("the Local Governmental and Governmental Employees Tort Immunity Act is in derogation of the common-law action . . . and must, therefore, be strictly construed against the local public entity."; Accord, *Miles v. City of Richmond*, 236 Va. 341, 344, 373 S.E.2d 715, 717 (Vir. 1988); *West Omaha Investments v. Sanitary and Improvement Dist. No. 48 of Sarpy County*, 227 Neb. 785, 420 N.W.2d 291, 293, 295 (1988)

[30] On some occasions, "filing an action for damages by the claimant within the time for giving notice, has been held sufficient to excuse failure of timely notice, since the clear purpose of the requirement to encourage early investigation of the claim at a time when the matter is still fresh, witnesses are available, and conditions have not materially changed, is thus well served." 18 McQuillin, Law of Municipal Corporations, sec. 53.154, p. 739 (1984) citing, *Dunbar v. Reiser*, 64 Ill. 2d 230, 356 N.E.2d 89 (Ill. 1976)

[31] 2 Antieau, Municipal Corporation Law, sec. 16.09, p. 16-24 (1992) Iowa, for example, held unconstitutional a notice of claim statute that required notice within 60 days as violative of the equal protection clauses of the federal and Iowa constitution by discriminating arbitrarily between victims of governmental

For example in, *Galbreath v. City of Indianapolis*, 253 Ind. 472, 255 N.E.2d 225 (1970) the Indiana Supreme Court interpreted service of notice upon the city attorney as adequate notice to the mayor although the statute explicitly required service on "the mayor . . . or clerk of any such city or a member of the board of trustees of any such town. . . . " 255 N.E.2d 226. The Indiana Supreme Court construed the Indiana statutory provision as, "Constituting a limitation on a common law duty, [that] must be strictly construed against such a limitation." 225 N.E.2d 228. Substantial compliance with the notice statute was adequate. This rule, the court observed, had in fact been tacitly applied in numerous cases cited at 255 N.E.2d 228. While sustaining the adequacy of the notices as given, even though not served upon the mayor, the court "took judicial notice of the fact that city government today is extremely complex." 255 N.E.2d 229. (Yet how much more complex is federal government?) Service

torts and victims of private torts. *Miller v. Boone County Hosp.*, 394 N.W.2d 776, 780 (Iowa 1986). The Iowa Supreme Court explicitly joined the decisions in *Reich v. State Highway Department*, 386 Mich. 617, 194 N.W.2d 700, 702 (Mich. 1972) (60 days); *Turner v. Staggs*, 89 Nev. 230, 235, 510 P.2d 879, 882-83 (Nev. 1973), cert. denied 414 U.S. 1079 (1973) (6 months too short); *Hunter v. North Mason High School*, 85 Wash. 2d 810, 539 P.2d 845 (1975); *O'Neal v. City of Parkersberg*, 160 W.Va. 694, 237 S.E.2d 504 (W.Va. 1977) (30 days for notice unconstitutionally short); see also, *Lepon v. Tiano*, 181 W.Va. 185, 381 S.E.2d 384 (W.Va. 1989) (6 month notice statute violated equal protection and due process at a time West Virginia had waived sovereign immunity). But see, *Fritz v. Regents of the University of Colorado*, 196 Colo. 335, 586 P. 2d 23 (Colo. 1978) (sustaining constitutionality of 90 day notice requirement) (citing inter alia an Iowa decision, *Lunday v. Vogelmann*, 213 N.W.2d 904 (Iowa 1973) which was subsequently overruled by *Miller v. Boone County Hospital, supra*); *compare, King v. Johnson*, 47 Ill.2d 247, 265 N.E.2d 874 (Ill. 1970) (6 month statute doesn't violate Illinois Constitutional prohibition of special privilege and immunities or special laws).

upon the city attorney as agent was held adequate, even though no specific language permitted such service. See also, *Scott v. Gatson*, 492 N.E.2d 337 (Ind. App. 1986) (no trap for the unwary); *Lawrence County Commissioners v. Chorely*, 398 N.E.2d 694, 697 (Ind. App. 1979)(Substantial compliance suffices, but acts and conduct of defendant can create a waiver of notice or an estoppel).

Similarly in *Bush v. City of Albany*, 125 Ga. App. 558, 188 S.E.2d 245 (Ga. App., 1972) notice that omitted the name of the claimant was held adequate. Georgia courts had also held that the notice statute "is in derogation of the common law, and must be strictly construed against the municipality." 188 S.E.2d 247 (See also cases cited) *Accord, Tanner v. City of Gainesville*, 162 Ga.App. 405, 290 S.E.2d 541 (Ga. App. 1982).[32] The *Bush* court stated: "technical accuracy in filing claims is no longer necessary, and the old doctrine of strict and literal compliance, with its attendant harsh and unfair results, has virtually disappeared from the law. What is required is that there be substantial compliance with a demand or claim requirement." 2 Antineau (sic), Municipal Corporation Law, Section 16.06, p. 472." 188 S.E.2d 248. A construction, "[S]hould not be given . . . as will defeat the ends of justice." 188 S.E.2d 248.

The Missouri Supreme Court agreed long before the initial enactment of the FTCA that a notice statute should be construed liberally in favor of the claimant and strictly against the municipality as a statute in derogation of the common law. *Glasgow v. City of St. Joseph*, 353 Mo. 740, 747, 184 S.W.2d 412, 414 (1944) *Glasgow* dealt with notice

[32] *Tanner v. City of Gainsville* dealt with both the adequacy of the notice in terms of content, finding substantial compliance, and also found the factual issue of whether the city had received the letter, created an issue of fact given the presumption that a properly addressed envelope, mailed with proper postage affixed, was received. 290 S.E.2d 544. See also cases cited at 290 S.E.2d 543.

of an accident (which had been given), from which death resulted at a later time (no notice given prior to suit). The statutory notice provisions were construed not to apply to the new cause of action from wrongful death which only sprang into existence at the time of death. 184 S.W.2d 415-416. Followed, *Lemming v. City of Salisbury*, 765 S.W.2d 271 (Mo. App. 1988)

Technical niceties are not required for notices in the District of Columbia. See, *Pitts v. District of Columbia*, 391 A.2d. 803 (D.C. App., 1978) (Oral notice to security guard in public housing project inadequate, but police reports were adequate.) "Precise exactness is not absolutely essential." 391 A.2d 807. Accord, *Hardy v. District of Columbia*, 616 A.2d 338 (D.C. App., 1992) (letter describing site of accident within 75 feet held adequate to allow the District to investigate the claim, to facilitate settlement of meritorious claims, and to correct defective conditions).[33] See *Washington v. District of Columbia*, 429 A.2d 1362, (D.C. App., 1981) (strict construction "to effectuate its legislative purpose because it is in derogation of the common law." at 1370).

The purposes of such notices included protection of municipalities against spurious claims. However, "It never was the intention of the legislature that this [notice] section was to be used as a sword to defeat the rights of a person having a legitimate claim. Its purpose was a shield to protect the municipality against spurious claims."[34]

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[33] "[A] substantial compliance with the statute, according to the weight of authority, is all that is required. . . ." McQuillin, supra, at sec. 53.163, p. 789. "A notice which is merely defective may be amended where there was no purpose to mislead the municipality, and in the absence of prejudice to the defendant, and this is particularly true under remedial statutes designed to prevent injustice. . . ." McQuillin, supra, at sec. 53.170, p. 814.

[34] McQuillin, supra, at sec. 53.153, p. 735, incorporates this language citing *Hopkins*. (Incorrectly naming and giving notice to the "East Syracuse Fire District," a nonexistent entity held

Hopkins v. East Syracuse Fire Department, 267 N.Y.S.2d 61, 49 Misc. 2d 197 (City Ct. of Syracuse, 1966) See also, *City of West Plains, Missouri v. Loomis*, 279 F.2d 564, 566 (8th Cir. 1960) (Prime object of the [Missouri] statute [was] to protect the city against fraudulent or stale demands.) "[T]he statute should be construed reasonably. Its design is to defeat unjust demands, not to lay pitfalls in the way of honest claimants. The city may use it as a shield, not as a sword. . . . " 279 F.2d 566.

III. Several District Courts Have Held that Substantial Compliance with Notice Requirements Comports with Congressional Intent for Federal Tort Claims Act Actions

Several federal district courts[35] have addressed similar problems of adequacy of the notice under the Federal Tort Claims Act itself.

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inadequate, but refiling permitted, municipalities possibly estopped from setting up a defense of failure of notice, plaintiff free to file a new action.)

[35] See also the initial opinion in *Kokaras v. United States*, 750 F.Supp. 35 (D.N.H. 1990). A claim was held effective despite omission of the specific amount of damages demanded, and effective both as to husband and wife, even though only the husband signed the Form 95 notice in *Kokaras v. United States*, 750 F.Supp. 542 (D.N.H., 1990), subsequent decision at 791 F.Supp. 35 (D.N.H. 1992) affirmed in part, reversed in part, 980 F.2d 20 (1st Cir. 1992) (omission of a sum certain demand for personal injury during two year period meant no adequate notice given on that claim, property damage claim held adequate). (See also cases cited at 750 F.Supp. 544 - 545.) The district court stated, "Relevant legislative history supports a liberal construction of the exhaustion requirement. Congress had two main purposes in enacting s. 2675(a) of the FTCA. First, Congress sought to 'ease court congestion and avoid unnecessary litigation, while making it possible for the government to expedite the fair settlement of tort claims asserted against the United

Detailed analysis of the legislative history of the Federal Tort Claims Act is contained in *Koziol v. United States*, 507 F.Supp. 87 (N.D. Ill. 1981). The court in *Koziol* rejected requirements of strict technical compliance with notice requirements. Indeed, the *Koziol* opinion contains analysis of the legislative history of the Federal Tort Claims Act quite similar to that of Part I of this brief. The Federal Tort Claims Act, according to the opinion by Judge Moran, was not designed, "' . . . to spare the Court the burden of trying cases . . . ' i.e., a provision for the relief of judges and courts. Rather, the Congress specifically stated that the [1966] amendments had ' . . . the common purpose of providing more fair and equitable treatment of private and individuals and claimants when they deal with their Government.' " 507 F.Supp. 90. The court described the cases upon which the government relied as a reflection of the reluctance to let go of the incidents and language of the concept of sovereign immunity.

> *"But Congress expressly did waive that immunity in cases of this nature. It evidenced no intention that the courts should act with greater rigidity with respect to claims against the sovereign than with respect to claims against the sovereign's ministers or servants."* 507 F.Supp. 91. (Citations omitted)

States. Second, Congress wanted to provide "fair and equitable treatment of private individuals and claimants when they deal with the government or are involved in litigation with the government. . . . Moreover, it seems fair to conclude that the FTCA is 'intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits.' " 750 F.Supp. 545. (citations omitted) The First Circuit held the sum certain demand inadequate in part.

IV. *Hallstrom v. Tillamook County* Should not Control the Case at Bar Because the Statutory History, Purposes and Text are All Substantially Different

A. The Statutory History and Text of Federal Environmental Statute Notice Provisions Differs From the Statutory History and Text of the Federal Tort Claims Act Notice Provision

Virtually all of the statutes referred to by Justice O'Connor's opinion for the court in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) are environmental statutes patterned after the Clean Air Amendments of 1970.[36] See n. 1, at 493 U.S. 22 (1989). The 1970 Act appears in no way to have been patterned after the Federal Tort Claims Act but reflects the desire to empower private "attorneys generals." RCRA, which was patterned after the 1970 Act provisions, thus exemplifies a completely separate historical development from that of the issues in the case at bar. Not a single mention could be located in debate of these environmental statutes that refers to the administrative presentation and notice requirements of the Federal Tort Claims Act.

The relevant language of the RCRA statute was: "No action may be *commenced* under paragraph (a)(1) of this section (1) prior to sixty days after the plaintiff has given notice of the violation A) to the Administrator of the EPA, B) to the state in which the alleged violation occurs; and

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[36] The Federal Tort Claims Act was not mentioned in any of the briefs to this court in *Hallstrom*. See also the *amicus curiae* brief by the Solicitor General in *Hallstrom* which cites only environmental statutes with the exception of a responsive argument (at p. 10) to an E.E.O.C. argument raised by petitioner in relation to *Zipes v. Trans World Airlines, Inc.* 455 U.S. 385 (1982). *See*, 493 U.S. 27. The 1970 Act was the *first* citizen suit environmental statute. *See*, Solicitor General *amicus brief* in *Hallstrom* p. 11.

C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order, ... " 42 U.S.C. Section 6972(b)(1) (1982 ed.) (emphasis added)

That language differs from the FTCA language, "An action shall not be *instituted* upon a claim. . . . " 28 U.S.C. § 2675(a). (emphasis added)

This Court pointed out in *Hallstrom* that the word "commenced" was identical to the language of Rule 3 of the Federal Rules of Civil Procedure that states "a civil action is commenced by filing a complaint with the court." 493 U.S. 26. The language of RCRA was read "in light of this rule." 493 U.S. 26.

In *Hallstrom* this Court also observed that Congress had explicitly carved out an exception from the RCRA bar on prematurely filed suits by 1984 amendments to RCRA, See, e.g. 42 U.S.C. § 6972(b)(1)(A) (1982 ed.), but the court pointed out that no exception applied to the situation in *Hallstrom* and the court asserted no ability to carve out an exception when Congress had declined to do so. 493 U.S. 27.[37]

Most importantly, however, this Court stated, "Nor will the dismissal of this action have the inequitable result of depriving petitioners of their "right to a day in court. . . . Petitioners remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards." 493 U.S. 32. Exactly the opposite is the case for the Petitioner in the instant case. Partly because the case "was lost in the mass of prisoner litigation," Jt.App.20. Mr. McNeil is long out of time to refile his case.

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[37] Moreover, this court noted that the case had been filed by a lawyer (indeed, a lawyer who at oral argument before the Supreme Court admitted his inadvertent neglect in failing to notify the state and federal agencies), as were most RCRA lawsuits. [McNeil proceeded pro se.]

No argument exists against Mr. McNeil's right to proceed that is analogous to the "balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." 493 U.S. 29.[38] By contrast instead of expressing a desire to eliminate suits from courts, Congress's explicit purpose in enacting the FTCA was to put such matters in court. Congress found this far preferable to private bills cluttering up its legislative docket.

B. The Language Congress Employed in the Federal Tort Claims Act Differs from that Used in the Environmental Statutes: The Definition of "Institute" in 28 U.S.C. sec. 2675 is Different from that of "Commence" as used in RCRA sec. 6972(b)

It is well settled that "the starting point for interpreting a statute is the language of the statute itself. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.* 447 U.S. 102, 108 (1980)." *Hallstrom* 493 U.S. 25.

When Congress uses two different words, a presumption should not arise that the same meaning was intended to attach to both words. The dictionary definitions of the words *institute* and *commence* are consistent with Congress intending a different meaning to be given to the two different words in the F.T.C.A. and in RCRA.

Websters Seventh New Collegiate Dictionary (1971) defines the verbs *commence* and *institute* as follows:

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[38] "Requiring citizens to comply with the notice and delay requirements serves this goal in two ways. First, notice allows Governmental agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. . . . Second, notice gives the alleged violator 'an opportunity to bring itself into compliance with the Act and thus render unnecessary a citizen suit.' " 493 U.S. 29.

Institute 1: to establish in a position or office 2 a : to originate and get established : ORGANIZE b : INAUGURATE, INITIATE

Commence (verb transitive) 1 : to enter upon : BEGIN 2 : to initiate formally by performing the first act of (verb intransitive) 1 : to have a beginning : START 2 : chiefly Brit.: to begin to be or to act as 3 : chiefly Brit. : to take a degree at a university (syn) see BEGIN

The terms are distinct, not identical, albeit similar, as illustrated by the reference to "initiate" in both definitions. The reference to "finally initiate" in the definition of commence captures the precise use of "commence" employed both in Rule 3 of the Federal Rules of Civil Procedure, and as interpreted by this court in *Hallstrom*. No such reference occurs with respect to "Institute," the language of F.T.C.A. section 2675. Indeed, the first applicable dictionary meaning of institute is: "to originate and get established." Such a meaning is literally quite consistent with the decisions of the circuits that permit perfection of a filing before substantial progress occurs.

There is a significant, and precisely relevant, difference between such "final initiation" i.e. filing of a complaint, and the looser requirements of "to originate and get established, organize, inaugurate, initiate." Commence implies a more precise point of time than does institute. To organize, except for the simplest process, necessarily involves and implies a period of time, oft times a prolonged period of time. For example, the invasion of Nazi dominated France "commenced" on D-Day, however, it makes sense to assert that it was instituted months or years earlier by the planning process and the process of bringing men and material together to "commence" the physical landings on the beaches from ships or behind the coast through parachutes and gliders. Similarly, it is proper usage to describe the resupply of ammunition and other goods after D-Day prior to the break out of the beach fronts as part of the "institution" of the invasion of Nazi occupied France. One could not

say, however, that such resupply "commenced" the invasion.

Similarly, the customary language (and policy) differs regarding environmental suits, which were described as "citizen-suits," (Solicitor General Amicus Brief in *Hallstrom* p. 11) from the customary language of Federal Tort Claims Actions which involve "claimants."[39]

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[39] The Solicitor General's amicus curiae brief in *Hallstrom* suggested that premature litigation discourages settlement as positions become hardened. p. 13-14. The history of the Federal Tort Claims Act not only is devoid of any such references to "fears of hardening positions," by contrast, Congress specifically addressed a related problem in the Federal Tort Claims Act during consideration of the 1966 amendments. Prior to those amendments suit had first to be filed to permit negotiated settlements to occur for amounts over $2,500. One of the objectives of the 1966 amendments was to permit more administrative settlements, for the agency authority to settle was expanded by these amendments. Once suit was filed, the agencies had previously been permitted to settle for amounts over $2,500. Congress considered and rejected the idea of extending the time for negotiation in complex cases. The right to resort to suit was explicitly chosen to prevail over extended delays for the purpose of encouraging settlement. See Senate Report No. 1327 partially reprinted in the Congressional Record Senate, 89th Cong. Second Sess. Vol 112, June 27, 1966 at 14377 et seq. "Therefore even though this 6-month period may prove insufficient in some instances, the committee does not believe that this period ought to be enlarged to attempt to insure time for final decision on all claims. This is the same position stated by the Department of Justice at the hearing." 14378, U.S. Code Cong. & Admin. News, (1966) p. 2519. Thus the argument against suit because it might "harden positions" applies quite differently, if at all, to FTCA plaintiffs (and not at all to Mr. McNeil). Of course not one word in the legislative history of the Federal Tort Claims Act suggests that settlements were not to continue being available once suit was filed. Moreover, the slight increase in attorneys fees (from 20 to 25 percent upon filing suit) must be perceived as a substantial and practical check on any hardening

V. The Holdings of Circuits that Refuse to Permit Perfection of Filing if No Substantial Progress has Occurred, are based on Limited Examination of Legislative History, with No Attention Paid to the 1946 Waiver. The Holdings of Other Circuits Are More Consistent with the Intent of Congress as Expressed in the Federal Tort Claims Act that the Same Rights Should Apply for achieving the Objectives of Justice and Fairness

The opinions of the circuits that have held that premature filings are inadequate are virtually devoid of evidence of detailed examination of legislative history. See, *Gregory v. Mitchell*, 634 F. 2d 199, 204 (5th Cir. 1981) which cites S. Rep. No. 1327, and briefly refers to *Adams v. United States*, 615 F.2d 284 (5th Cir. 1980) at 634 F.2d 204, n.3; and *Reynolds v. United States*, 748 F.2d 291 (5th Cir. 1984) (which cites no legislative history but does cite *Gregory v. Mitchell); Jerves v. United States* 966 F.2d 517 (9th Cir. 1992) (which cites no legislative history); and *McNeil v. United States*, 964 F.2d 647 (7th Cir. 1992) (which cites no legislative history but is the only opinion to cite *Kubrick v. United States*, 581 F.2d 1092 (3rd Cir.), reversed, 444 U.S. 111 (1979)).[40]

The only circuit opinion that discusses the objectives of Congress (although in relationship to the adequacy of the notice provisions) is *Adams v. United States*, at 615 F.2d

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of negotiating positions for most FTCA claimants. The time and cost of trial are obviously substantial factors in the recommendations and conduct of attorneys representing tort claimants.

[40] This court in *Kubrick*, at 444 U.S. 121 n.6, did examine the legislative history in relationship to when a claim accrues. Of course, no allegation has been made that Mr. McNeil is out of time in relationship to the accrual of his action. However, statutes of limitation by definition terminate actions filed out of time. Certainly Congress intended this in the FTCA area. Statutes of limitations do not terminate prematurely filed actions.

288.[41] That opinion indicates that Congress had two purposes in enacting the notice requirement:

> 1) "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States;" and,
>
> 2) "of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government."

In this particular respect these opinions differ little from those in *Celestine v. Veterans Administration Hospital*, 746 F.2d 1360 (8th Cir. 1984), *Kubrick v. United States*, 581 F.2d 1092 (3rd Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979), and the district court opinion in *Abernathy v. United States*, 732 F.Supp. 98 (D. Kan. 1990). None examines the legislative history in detail. However, each of these opinions have the common thread that they deal with the problem in a simple and practical manner, avoiding needless formalities, instead of resorting to metaphysics of the doctrine the king can do no wrong, a doctrine explicitly abandoned by Congress in 1946.

Obviously Mr. McNeil satisfied (twice) the obligation of bringing his claim to the attention of the federal agency. Moreover, he twice received what he thought were letters from the Government that permitted him to sue. Jt.App.10. Since his claim was denied, obviously litigation of his claim was in fact necessary for any possibility of recovery. The United States has had a full and

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[41] The legislative history examined by the court in *Adams*, however, appears to have been limited to that of the 1966 amendments. No attempt was made to put the Federal Tort Claims Act in context of its original enactment and as argued above, such contextualization suggests that Congress's purposes in relationship to the Federal Tort Claims Act are disserved, rather than served, by barring Mr. McNeil's suit.

fair opportunity to settle with him twice, and specifically declined to do so on one occasion, Jt.App.12 and also did so by de facto not responding within 6 months with respect to his original claim. Thus each of the considerations implicated by the first purpose was fully and adequately served by Mr. McNeil's actions.

Moreover, it is difficult to see how the purposes of providing more fair and equitable treatment of claimants when they deal with their government are served by dismissing a claim until more than a year after the claim became stale for refiling purposes. When the court system fails to act, and by such failure puts a litigant into situations such as that of the plaintiff in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), this court has acted to eliminate that clear unfairness.

Indeed, as a practical matter, had the United States district court ruled upon and not stayed the matter of Mr. McNeil's in forma pauperis filing, and or had the fact that Mr. McNeil had paid the filing fee been brought to the court's attention, the court might very well have promptly received a motion to dismiss (instead of an answer), and ruled upon it in time for Mr. McNeil to refile.[42]

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[42] The fact that an answer was filed prior to a motion to dismiss in this case may suggest that the government's own attorneys also had some initial difficulty understanding the application of the procedural bar, if any, of premature filing under the Federal Tort Claims Act. Of course, Mr. McNeil could not have located any precedent on the matter in the Seventh Circuit opinions available in the prison library since the decision in his case is the first in the Seventh Circuit.

VI. Every Purpose of Congress Actually Expressed in Enactment of the Federal Tort Claims Act and its Amendments would be Served by permitting Mr. McNeil's Suit to Proceed: The Opposite Rule Disserves Many Articulated Purposes in a Manner So as To Read Such Purposes out of a Statute Designed to Promote Justice

Since in any event the government will have to respond to "premature filings" by motions to dismiss, no additional cost to the government will be saved by dismissing prematurely filed suits if the agency had already rejected the claim or the six months have passed, except in cases in which refiling is precluded by the statute of limitations. Then the procedural step turns into an absolute bar, as it would in Mr. McNeil's case, unless resort is taken to a private bill in Congress. Nor is it a fair response to assert that the government has saved the claimant money and time in fruitless litigation, by tossing the valid claims out of court along with invalid claims.

Mr. McNeil sent a letter almost immediately after receiving his sum certain denial letter, stating that he desired to "commence" his litigation. Whether he intentionally or unintentionally employed the magic word of Rule 3 of the Federal Rules of Civil Procedure is unclear. However, the fact that he did was clear to Judge Ripple. Jt.App.31. Mr. McNeil may have thought, as many laymen would reasonably have thought, that he had done everything necessary to commence the litigation.

This letter should have been considered a supplemental pleading under Rule 15(d) of the Federal Rules of Civil Procedure. Since the 1963 amendment of that Rule, supplemental pleadings have been allowed for a variety of reasons even where an original pleading may be defective in that it fails to state a claim for relief. (6A Wright & Miller, Federal Practice and Procedure, Sec. 1496 & 1505 (1990)) Courts have allowed supplemental pleadings to be used to perfect premature filings. *See, Security Ins. Co. v. United States for Use of Haydis*, 338 F.2d 444 (9th Cir.

1964); *United States v. C.J. Electrical Contractors, Inc.*, 535 F.2d 1326 (1st Cir. 1976) (Miller Act cases). The United States has been permitted to supplement its original complaint. *United States v. Local 560*, 694 F.Supp. 1158, 1187 (D.N.J. 1988) No prejudice would accrue to the Government were Mr. McNeil permitted to do the same, indeed, no responsive pleadings were filed for over a year. (Indeed, Rule 15(a) could be used to construe the August, 1989 filing an amendment as of right.)

There is obvious unfairness in barring the court door to Mr. McNeil. His initial filing reacted to some letter that he obviously construed as a sum certain denial [most probably the FOIA letter denying that any documents could be located about any such experimentation]. Yet the overall purposes of the Federal Tort Claims Act was to provide fairness to claimants.

To deny Mr. McNeil a right to sue because he sued to soon, is a ludicrous rule were private defendants to raise it. Such a rule denies equal treatment for suits against the United States as against private defendants. That disserves another significant purpose of enactment of the Federal Tort Claims Act, that actions be the same as against private defendants.

To deny Mr. McNeil a right to sue because he failed to exhaust administrative remedies, when he thought the had exhausted them twice, can not prevent subsequent litigants form premature filings, for they too might receive a letter they believed was a sum certain denial, and "institute" litigation. Nor can such a rule conceivably be described as part of a "simple" remedy, another purpose of the Federal Tort Claims Act.

To deny Mr. McNeil a right to sue is to create a special defense, available only to the Government, not available to other defendants, a purpose Congress rejected time and time again in other contexts such as in attempts to resist the extension of the statute of limitations for Federal Tort Claims Act purposes to make it as

similar to comparable state statutes of limitations as possible. Special pleadings that the government needed such special defenses were simply rejected.

To deny Mr. McNeil a right to sue, denies the explicit statutory history indicating Congress looked at statutes and litigation involving suits against municipalities, and the general direction of decisions in this area requiring only substantial compliance with notice requirements. Such a denial rejects the view that many courts have taken that such statutes are in derogation of the common law and should be strictly construed against the municipality.

To deny Mr. McNeil a right to sue, denies the reality that although most tort actions against the United States are brought by lawyers, despite Congress's explicit encouragement of representation by raising the level of attorneys fees, some individuals still may be unable to get the ear of a lawyer for any number of reasons. Such individuals are forced to proceed pro se, but a basic purpose of the Federal Tort Claims Act was to attempt to make a remedy available both to the rich and the poor as a matter of right, and not as a matter of grace.

To deny prisoners, who may be the most frequent persons with limited access to lawyers and library material, the right to challenge alleged experimentation upon their bodies with some of the deadliest diseases known to man, smacks of willful concealment and coverup – exactly what Mr. McNeil must have thought was occurring when he was informed that no documents could be located about experiments which later were admitted to have occurred.

To deny Mr. McNeil a right to suit when the government has indicated no actual prejudice exalts form over substance and is difficult to reconcile with the essence of justice.

Lastly, to deny Mr. McNeil his right to suit requires both giving a meaning to the statutory language "institute" which is not one of the primary meanings of that

word, and rejecting the fact that Congress continues to use the word "instituted" from 1946 until today in 28 U.S.C. section 2675, despite Congresses repeated use of a different word, "commence," in environmental statutes for notice provisions, and despite this court's adoption in 1937 of similar language in Rule 3 of the Federal Rules of Civil Procedure. *See*, FTCA § 411 (App. 5).

CONCLUSION

Wherefore the Petitioner respectfully requests that this court reverse the decision of the United States Court of Appeals for the Seventh Circuit and remand this case for further proceedings upon the merits.

Respectfully submitted,

/s/ Allen E. Shoenberger
Court Appointed Counsel

60 Stat. 843 (August 2, 1946)
(79th Cong. 2nd Sess.)

TITLE IV – FEDERAL TORT CLAIMS ACT

PART 1 – SHORT TITLE AND DEFINITIONS

SHORT TITLE

SEC. 401. This title may be cited as the "Federal Tort Claims Act".

DEFINITIONS

SEC. 402. As used in this title, the term –

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: *Provided*, That this shall not be construed to include any contractor with the United States.

(b) "Employee of the government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Part 2 – Administrative Adjustment of Tort Claims Against the United States

claims of $1,000 or less

Sec. 403. (A) Subject to the limitations of this title, authority is hereby conferred upon the head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, to consider, ascertain, adjust, determine, and settle any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.

(b) Subject to the provisions of part 3 of this title, any such award or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud, not withstanding any other provision of law to the contrary.

(c) Any award made to any claimant pursuant to this section, and any award, compromise, or settlement of any claim cognizable under this title made by the Attorney General pursuant to section 413, shall be paid by the head of the Federal agency concerned out of appropriations that may be made therefor, which appropriations are hereby authorized.

(d) The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

report

Sec. 404. The head of each Federal agency shall annually make a report to the Congress of all claims paid by such Federal agency under this part. Such report shall include the name of each claimant, a statement of the amount claimed and the amount awarded, and a brief description of the claim.

Part 3 – Suits on Tort Claims Against the United States

jurisdiction

Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances

where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, That the claimant may, upon fifteen days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of

the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

PROCEDURE

SEC. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).

REVIEW

SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal –

(1) In the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(2) in the Court of Claims of the United States: *Provided*, That the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall be taken

within three months after the entry of the judgment of the district court, and shall be governed by the rules relating to appeals from a district court to a circuit court of appeals adopted by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064) In such appeals the Court of Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeals in respect to appeals under section 4 of the Act of February 13, 1925 (43 Stat. 939).

(b) Sections 239 and 240 of the Judicial Code, as amended, shall apply to cases under this part in the circuit courts of appeals and in the Court of Claims of the United States to the same extent as to cases in a circuit court of appeals therein referred to.

COMPROMISE

SEC. 413. With a view to doing substantial justice, the Attorney General is authorized to arbitrate, compromise, or settle any claim cognizable under this part, after the institution of any suit thereon, with the approval of the court in which such suit is pending.

PART 4 – PROVISIONS COMMON TO PART 2 AND PART 3

ONE-YEAR STATUTE OF LIMITATIONS

SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not

exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

EXCEPTIONS

SEC. 421. The provisions of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the government, whether or not the discretion involved be abused.

(b) any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of

any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., title 46.secs. 741-752, inclusive), or the Act of March 3, 1925 (U.S.C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

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62 Stat. 971 (June 25, 1948)
(80th Cong. 2nd Sess.)

§ 2401. Time for commencing action against United States

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless action is begun thereon within one year after such claim accrues, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within one year after such claim accrues. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the

agency or the date of mailing notice by the agency of final disposition of the claim.

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62 Stat. 983 (June 25, 1948)
(80th Cong. 2nd Sess.)

§ 2672. Administrative adjustment of claims of $1,000 or less

The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud.

Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to section 2678 of this title, shall be paid by the head of the federal agency concerned out of

such agency's appropriations therefor, which appropriations are hereby authorized.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

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§ 2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

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§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

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§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

(b) The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this subsection shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the

federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

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63 Stat. 62 (April 25, 1949)
(81st Cong. 1st Sess.)

AN ACT

To amend title 28 of the United States Code to provide additional time for bringing suit against the United States in the case of certain tort claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the first sentence of section 2401 (b) of title 28 of the United States Code is hereby amended to read as follows: "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later."

SEC. 2. (a) Section 1346 (b) of title 28 of the United States Code is hereby amended to read as follows:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

(b) The first paragraph of section 2672 of title 28 of the United States Code is hereby amended to read as follows:

"The head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Approved April 25, 1949.

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63 Stat. 107 (May 24, 1949) (81st Cong. 1st Sess.)

SEC. 126. The second sentence of subsection (b) of section 2675 of title 28. United States Code, is amended by striking out the word "sub-section" appearing therein and inserting in lieu thereof the word "section".

Pub. L. 86-238, 73 Stat. 472 (Sept. 8, 1959)

* * *

(2) The analysis of chapter 171 is amended by striking out the following item:

"2672. Administrative adjustment of claims of $1,000 or less."

and by inserting the following item in place thereof:

"2672. Administrative adjustment of claims of $2,500 or less."

(3) Subsection (b) of section 2401 of title 28, United States Code, is amended by striking out "$1,000" wherever it appears in such subsection, and by inserting in lieu thereof "$2,500".

Approved September 8, 1959.

Pub. L. 89-506, 80 Stat. 306 (July 18, 1966)

AN ACT

To amend the Federal Tort Claims Act to authorize increased agency consideration of tort claims against the Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, (a) That the first paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided.* That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee."

(b) The second paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be

final and conclusive on all officers of the Government, except when procured by means of fraud."

(c) The third paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromise, or settlements under this chapter."

SEC. 2. (a) Subsection (a) of section 2675 of title 28, United States Code, is amended to read as follows:

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final

denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim."

(b) Subsection (b) of section 2675 of title 28. United States Code, is amended by deleting the first sentence thereof.

SEC. 3. Section 2677 of title 28, United States Code, is amended to read as follows:

"The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon."

SEC. 4. The first paragraph of section 2678 of title 28, United States Code, is amended to read as follows:

"No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title."

SEC. 5. (a) Subsection (b) of section 2679 of title 28, United States Code, is amended to read as follows:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office

or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

(b) Subsection (a) of section 4116 of title 38, United States Code, is amended to read as follows:

"(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharmacist, or paramedical (for example, medical and dental technicians, nursing assistants, and therapists) or other supporting personnel in furnishing medical care or treatment while in the exercise of his duties in or for the Department of Medicine and Surgery shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his estate) whose act or omission gave rise to such claim."

SEC. 6. Section 1302 of the Act of July 27, 1956, as amended (70 Stat. 694, 75 Stat. 416; 31 U.S.C. 724a), is further amended (1) by inserting a comma and the word "awards," after the word "judgments" and before the word "and"; (2) by deleting the word "or" after the number "2414" and inserting in lieu thereof a comma; and (3) by inserting after the number "2517" the phrase ",2672, or 2677".

SEC. 7. Subsection (b) of section 2401 of title 28, United States Code, is amended to read as follows:

"(b) a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

SEC. 8. The first sentence of section 2671 of title 28, United States Code, is amended to read as follows: "As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."

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28 U.S.C. Section 2675 (1992 pocket part, U.S.C.A.)

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

(As amended July 18, 1966, Pub.L. 89-506, § 2, 80 Stat. 306.)

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28 U.S.C. Section 2675 (U.S.C.A. 1965)

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of

property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

(b) The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages. June 25, 1948, c. 646, 62 Stat. 983; May 24, 1949, c. 139, § 126, 63 Stat. 107.

SWDA (RCRA), 42 U.S.C. § 6972(b)

* * *

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section –

(A) prior to 60 days after the plaintiff has given notice of the violation to –

(i) the Administrator;
(ii) the State in which the alleged violation occurs; and
(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to –

(i) the Administrator;
(ii) the State in which the alleged endangerment may occur;
(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment –

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 US.C.A. § 9606].

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response. Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A § 9601 et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [42 U.S.C.A. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a

removal action. Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.